

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
MIDLAND DIVISION

ROBERT C. SMITH, §  
Plaintiff, §  
vs. § CIVIL ACTION NO. MO-17-CA-00031-RAJ-DC  
ARMY BOARD OF CORRECTIONS §  
FOR MILITARY RECORDS, ET. AL. §  
Defendant. §

**DEFENDANT'S ORIGINAL ANSWER**

The Army Board of Corrections for Military Records (ABCMR), and the Secretary of the Army, by and through the Honorable John Bash, United States Attorney for the Western District of Texas, and James Dingivan, Assistant United States Attorney, files this, its Original Answer to the Original Complaint of Plaintiff Edwin Diaz ("Plaintiff"), responding according to the numbered paragraphs thereof, and respectfully shows the Court as follows:

1. In response to plaintiff's paragraphs 1 and 2, detailing his proposed bases for jurisdiction, Defendant would refer to this court's Order Denying Defendants' Motion to Dismiss, dated November 29, 2017 (Docket 29) finding jurisdiction under the Administrative Procedures Act to review a decision a decision made by the ABCMR, but not to promote plaintiff.
2. Subject to the objection previously raised by Defendant, and in accordance with this court's order, Defendant agrees that under said order, Venue is appropriate in the Western District of Texas.
3. In response to plaintiff's paragraph 4, Defendant lacks sufficient knowledge or information regarding plaintiff's current home address, and so denies.
4. In response to plaintiff's paragraphs 5 and 6, Defendant admits those two entities may be served in the manner described.

5. In response to plaintiff's paragraph 7, Defendant admits the factual allegations contained therein.

6. In response to plaintiff's paragraph 8, Defendant admits the factual allegations contained therein.

7. In response to plaintiff's paragraph 9, Defendant admits the factual allegations contained therein.

8. In response to plaintiff's paragraph 10, Defendant admits that plaintiff's investigation was not completed until November 2008 and that date's temporal relationship to his Officer Candidate School (OCS) completion and his OCS certificate expiration date. However, Defendant denies these allegations or averments are "inexplicable."

9. In response to plaintiff's paragraph 11, Defendant admits the factual allegations contained therein.

10. In response to plaintiff's paragraph 12, Defendant admits plaintiff enlisted in the New Mexico Army National Guard (NMANG), that he spoke with Staff Sergeant Donna Sullivan, and that he did not then have a current security clearance. All other statements of fact, allegations, or averments contained therein are denied.

11. In response to plaintiff's paragraph 13, Defendant admits plaintiff petitioned the ABCMR and the findings of the ABCMR cited by plaintiff. All other statements of fact, allegations, and averments are denied. Plaintiff's legal conclusions in paragraph 13 require no response. To the extent a response is required, these allegations are denied.

12. In response to plaintiff's paragraph 14, Defendant would refer to this court's Order Denying Defendants' Motion to Dismiss, dated November 29, 2017 (Docket 29) finding jurisdiction under the Administrative Procedures Act to review a decision a decision made by the ABCMR, but not to promote plaintiff.

13. In response to plaintiff's paragraphs 15 and 16, these are legal conclusions to which no response is required. To the extent a response is required, these allegations are denied.

14. In response to plaintiff's paragraph 17, Defendant admits that Army procedures are guided by AR 380-67; however, Defendant denies that this is the sole governing instruction for processing security clearances. To the extent this paragraph contains legal conclusions, no response is required. To the extent a response is required, these allegations are denied.

15. Plaintiff's paragraphs 18, 19, and 20 contain legal conclusions to which no response is required. To the extent a response is required, these allegations are denied.

16. In response to plaintiff's paragraph 21, Defendant admits the content of AR 600-100, but denies all other allegations or averments in this paragraph.

17. In response to plaintiff's paragraph 22, Defendant lacks sufficient knowledge or information regarding the phrase "on all fours to this case" to understand what Plaintiff is attempting to state, and, accordingly, so denies.

18. In response to plaintiff's paragraph 23, Defendant admits the ABCMR found that Plaintiff's actions caused, in part, the 2 year delay in processing. Defendant denies all other allegations.

19. In response to plaintiff's paragraph 24, Defendant admits the allegations contained therein.

20. In response to plaintiff's paragraph 25, this paragraph contains legal conclusions to which no response is required. To the extent a response is required, these allegations are denied.

21. With respect to plaintiff's prayer for relief, no answer is required. However, to the extent that the aforementioned paragraph is deemed to contain allegations or averments, they are denied.

#### **AFFIRMATIVE DEFENSES**

22. Defendant United States hereby specifically reserves the right to assert any and all other defenses, not currently known, which it may have or through discovery learn may be applicable.

WHEREFORE having fully answered Plaintiff's Complaint, Defendant respectfully requests that Plaintiff's Complaint be dismissed with prejudice and without costs, and that Defendant be granted its costs of defense, including attorney's fees, as well as such other, further, different relief to which the Defendant might otherwise show itself to be justly entitled.

Dated: December 13, 2017

Respectfully submitted,  
**JOHN BASH**  
United States Attorney

By: /s/James E. Dingivan  
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**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of December 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

*/s/James E. Dingivan*  
**JAMES E. DINGIVAN**  
Assistant U.S. Attorney